No. 11939

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of C. A. Reed Furniture Company, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

McLAUGHLIN, McGINLEY & HANSON,
FRANK WELLER and
JAMES A. McLAUGHLIN,
1224 Bank of America Building, Los Angeles 14,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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APPELLEE'S BRIEF.

Statement of Case.

Appellant, acting in behalf of a large number of employees of the above named bankrupt, filed a claim for their unpaid wages. The Referee allowed the claim as a prior claim to the extent of $5,542.61, and as a general claim in the sum of $2,880.58. [R. 5.] Part of the first sum represented compensation for earned but unused vacation time, and the latter figure represented three-fourths of the unused vacation time which the Referee found had been earned prior to the three months' period preceding the bankruptcy. [R. 4.]

The order refers to a schedule attached to it, which set forth the specific allowances to each of the employees and classified these in their amounts as to priority and to the extent that they were mere general claims without

priority. [R. 5.] To abbreviate the record, this schedule, referred to in the order as "Exhibit A" was eliminated from the record, as the appeal was believed not to involve any question as to the specific allowances to each employee, but only the question whether all earned vacation pay should be allowed as a prior claim.

The two union contracts involved now appear to be different, and this may result in a different ruling as to the status of the employees working under one of these contracts as distinguished from those working under the other. If this Court agrees with appellee, the ruling of the District Court will be found to be correct as to both of these contracts, however.

These union contracts came into the focus rather late. They were not put into evidence at the time of the hearing before the Referee, and there was no attempt to show which employees came under either of these two contracts. It was after the Referee made his order that the parties stipulated that these contracts could be made a part of the record in order that appellant might present the question of their effect in its Petition for Review to the District Court. [R. 6.]

To avoid any confusion as to the amendment which the Referee made to his original order on February 4, 1948, it should be noted that this amendment in no way touches the issues here involved. The original order had denied priority to a claim for $242.50 in union dues withheld by the bankrupt from pay checks of the employees. [R. 5.] The amendment properly allowed this item as a prior claim. [R. 30-31.]

Statement of Questions Involved.

1. Do either of the union contracts contain any provision which makes inapplicable the rule of *In re Public Ledger,* 161 F. (2d) 762, to the effect that the portion of the vacation entitled to be classified as priority compensation is the fractional part earned within the three months preceding the date of bankruptcy.

2. The union contract covering those employees classified as upholsterers provides that employees "who have been in the employ of the employer for one year, or more, * * * shall receive a week's vacation with forty hours' pay at the wage rate prevailing immediately prior to the vacation." [R. 11] It also provides that "Such vacation shall be taken at a time mutually agreeable to the employee and the employer."

If the rule of proration established by the *Public Ledger* case (*supra*), does not apply, then would not each employee have fully earned his vacation under this contract at the end of his twelve months' period of service? If such twelve months' service had ended more than three months prior to the date of bankruptcy, should not the entire amount of such employee's claim be classified as a general claim as distinguished from a claim entitled to priority?

3. The union contract covering those employees classified as furniture workers contained the following pertinent provisions under Article VII:

> "(a) Each employee shall receive one (1) weeks vacation after one (1) year of service with the Com-

pany and two (2) weeks vacation after three (3) years of service with the Company, except that this liberalized vacation benefit shall not apply to those employees who have taken their 1946 vacations.

(b) Vacations shall be taken during July, August, or September and vacation pay shall be computed at any time it accrues during that period." [R. 20-21.]

Subparagraph (e) also provided that "there shall be no pro rata vacation." [R. 22.]

If the *Public Ledger* rule does not apply, then did the right to the vacation accrue at the end of the year's service of each employee? If it did not accrue then, could it be said to have accrued automatically by virtue of the bankrupt's having been adjudicated as such, having in mind the provision to the effect that vacations should be taken during July, August or September?

ARGUMENT.

POINT I.

The Rule of the Public Ledger Case, to the Effect That the Portion of the Vacation Compensation Entitled to Priority Is the One-Fourth Earned During the Three Months Preceding Bankruptcy, Is in Equitable One Which Assures Equal Treatment to All Employees Regardless of Whether Their Year's Employment Had Ended Within or Prior to Such Three Months' Period.

The cases of *In re Public Ledger,* 161 F. (2d) 762, and *In re Wil-Low Cafeteria,* 111 F. (2d) 429, both approve the equitable doctrine of pro rating the vacation compensation entitled to priority in accordance with the amount of such vacation compensation earned within the three months preceding the date of bankruptcy. A contrary rule would mean that each employee's vacation compensation was fully earned as soon as he had the right to demand his vacation and, under a contract requiring a year's employment as a condition precedent to such vacation, the entire vacation pay would accrue at the end of such year. As to those employees whose years of employment had expired more than three months prior to the bankruptcy, they would be entitled to no priority because their vacation compensation was fully earned prior to the commencement of such three months' period. Section 64a of the Bankruptcy Act (Title 11, Ch. 7, Sec. 104, U. S. C. A.) provides a priority only as to wages "earned within three months before the date of the commencement of the proceeding."

There is no more justification for attempting to give priority to vacation pay accruing prior to such three months' period than there is to giving priority to straight wages earned prior to such three months' period.

The authorities are uniform in holding that the compensation claimed must have been earned and also must have become due within the three months' period. If either of these essentials is lacking, then the claim is not entitled to priority.

See:

In re Ko-Ed Tavern (Third Circuit), 129 F. (2d) 806, at 810;

In re Slomka (C. C. A., N. Y.), 122 Fed. 630;

In re Unit Lock Co. (D. C. Okla.), 49 F. (2d) 313, at 315 and 316;

In re Rouse, Hazard & Co. (D. C., Ill.), 91 Fed. 96;

In re Flick (D. C., Ohio), 105 Fed. 503;

In re B. H. Gladding Co. (D. C., R. I.), 120 Fed. 709;

In re Burton Bros. Mfg. Co. (D. C., Iowa), 134 Fed. 157;

In re Huntenburg (D. C., N. Y.), 153 Fed. 768;

In re McGowin Lumber Co. (D. C., Ala.), 223 Fed. 553;

In re Caledonia Coal Co. (D. C., Mich.), 254 Fed. 742;

Stanley Works v. Gourland Typewriter Mfg. Co. (D. C., N. Y.), 278 Fed. 995;

In re Dunn (D. C., N. Y.), 181 Fed. 701.

It is clear from the above authorities that the rule contended for by appellant would be a dangerous and unsatisfactory rule from the standpoint of the employees. In the first place, in order to preclude the possibility of the employee losing his priority to a claim for compensation during a vacation period he would of necessity have to take his vacation within three months after his year's employment period had expired, otherwise none of his vacation would have become due within the period of three months prior to bankruptcy.

Such a rule would result in hardship and inconvenience to the employees, and it would also place one employee in a position of priority whereas another employee, by the mere accident of having his year's period of employment terminate at a different time, would lose all of his priority.

There is still a more formidable impedement to be met with. Let us assume an instance where an employee's year's period of employment had terminated within three months prior to the bankruptcy proceedings. In such instance it is clear that he could have demanded his vacation within that period and the compensation for the vacation period would therefore become due within the three month's period; however, this vacation was not entirely earned by the work that he did on the last day of his year's employment. It was earned because he worked a full twelve months, and each day's work during that twelve months contributed to and was necessary to the earning of that vacation.

This brings us again to the logic in the *Public Ledger* case wherein the Court allowed priority in the proportionate amount of the vacation earned during the three months preceding the bankruptcy. This is the only way that employees can be placed in a position to assert any

priority on account of vacation pay. If they reject the principle of the *Public Ledger* case, they relegate themselves to the hopeless position of being unable to establish that their vacation pay became due and was wholly earned within the three months preceding the bankruptcy.

There is another infirmity in this position and that results from the fact that the contracts entitle the employees to select their time of vacation. If bankruptcy intervenes before they enter upon such vacation they have not reached the place where any vacation pay has become due them, and they are faced with the obstacle that the vacation pay did not become due within three months prior to the bankruptcy, but that it was to come due on the date subsequent to bankruptcy. Here again the statute expressly requires that wages be *due* to the employee "within three months before the date of the commencement of the proceeding."

POINT II.

If the Appellant's Argument Is Accepted, Then All of the Employees Under the Upholsterers' Contract Should Have Been Denied Any Priority for Any Part of Their Vacation Pay.

We have pointed out that Article VII of this contract entitles the employee to a vacation at the end of each year's employment. It also provides that the vacation is to be taken at a time mutually agreeable to the employer and the employee. This would mean that the employee could take his vacation at any time after the end of his year's employment provided that the time was agreeable to the employer.

We have already noted that because appellant has attempted to inject the provisions of the union contracts

into this case in order to defeat the application of the *Public Ledger* doctrine, and because such attempt occurred after the hearing and ruling of the Referee, the record is deficient in that it does not show the respective dates of the expiration of the year's employment for each employee involved. Neither does it show which contract governs which employee.

Before appellant can show the existence of any harmful error, and we do not concede that there was any error, it would be essential for appellant to show that there were employees whose year's period of employment had ended within three months prior to July 11, 1947, the date of the bankruptcy. Even if the evidence did show that there were such employees, they would still be met with the obstacle that not having taken or started to take their vacations within such three months' period, the vacation pay had not become due prior to bankruptcy.

Such employer would also be confronted with the further obstacle that regardless of whether or not they had commenced or completed their vacations within the three months' period, they could not show that they had *earned* that entire vacation by working during the three months preceding the bankruptcy. In fact, it is clear that the situation is just the contrary. They earned their vacation by working an entire year, and each day's work during such year contributed to the earning of that vacation and was necessary to the earning of such vacation.

POINT III.

The Employees Under the Furniture Workers' Contract Are Not Benefited by the Provision in Their Contract Restricting Their Vacation Time to the Months of July, August or September.

It might be argued that as to employees under this contract, their vacation compensation did not become due until one of the above mentioned months, but it is clear that regardless of when such compensation became due it was earned by each employee working an entire year. This being true, these employees are subject to the deficiency that their vacation compensation was not entirely earned within the three months' period preceding bankruptcy. In addition to this, the compensation would not have accrued to any of these employees unless they had entered upon or taken their vacations between July 1 and July 11 (the date of the bankruptcy). The record does not show whether any of the employees had taken or commenced their vacations within that period, but if they had they could not qualify for any priority because such compensation was not *earned* within the three months' period preceding bankruptcy.

The provision in the contract, that "there shall be no pro rata vacation," does not aid them. This clearly means that they must have completed a full year of employment before being entitled to any vacation. It has nothing to do with how much of the vacation pay should be allowed as a prior claim. It does not even purport to deal with the bankruptcy statute as to prior claims.

Conclusion.

There is no question involved as to the allowability of a claim for compensation during vacation. The only question is whether such claim is entitled to be allowed as a prior claim and if so, the rule which should be applied in determining the amount of such compensation which should be given priority.

The order made is not only predicated upon equitable considerations in that it allows one-fourth of the compensation as a prior claim, but it is predicated upon the only theory on which any of such vacation compensation could be given priority.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

McLaughlin, McGinley & Hanson,
Frank Weller and
James A. McLaughlin,

Attorneys for Appellee.